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FEB 12 1937
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICUS CURIAE.

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Chicago, Illinois,
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THE DEVINNEY-WARREN PRINTING COMPANY, 175 WEST JACKSON, CHICAGO

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HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

BRIEF FILED BY THE UNDERSIGNED AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI OF ANNISTON MANUFACTURING COMPANY.

The undersigned, as *amicus curiae*, respectfully requests the court to grant the Petition for Certiorari filed by Anniston Manufacturing Company, petitioner in the above entitled cause, for the following reasons:

I. Because of the social and economic desirability of a final decision of the questions involved.

II. Because of the great importance of the questions of law presented.

I.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE OF THE SOCIAL AND ECONOMIC DESIRABILITY OF A FINAL DETERMINATION OF THE QUESTIONS INVOLVED.

This suit is one of more than 200 suits, which have been brought to obtain a refund of floor stock, processing or compensating taxes collected under the pretended authority of the Agricultural Adjustment Act, approved May 12, 1933, which was declared invalid by this Court January 6, 1936. The total amount of taxes collected under that Act aggregated several hundred million dollars; in fact, there was exacted from the taxpayer by whose attorney this brief is filed more than $11,000,000.00. Since a decision in the instant case will probably determine whether or not the 73,000* taxpayers who paid processing taxes and the many more who paid floor stock taxes will recover a substantial portion of the moneys exacted from them, the importance to these taxpayers of a review by this Court of the decision of the Circuit Court of Appeals for the Fifth Circuit can not be over-estimated.

Denial of the petition, will, of course, necessitate the continued prosecution of these 200 pending suits with great expense both to the claimants and the Government. It will leave the Government and taxpayers under the necessity of incurring large expense in attempting to solve the difficult questions of fact presented by Title VII, all of which expense will have been wasted if Title VII is later held unconstitutional. It will leave many claimants with their balance sheets unsettled and with business plans necessarily uncertain.

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* Report of House Committee on Ways and Means to accompany H. R. 12793 (74th Congress, 2nd Session).

In the lower Federal Courts the greatest confusion prevails as to the validity of this Title. Thus, the District Judge for the Eastern District of Virginia, in the case of *Priddy and Company, Inc.* v. *Early, Collector*, has declared the entire Title to be unconstitutional and void, citing some twenty-one grounds of invalidity. Likewise, the Judge of the District Court for the Eastern District of Wisconsin, in the case of *Cudahy Brothers Co.* v. *La Budde, Collector*, has declared Title VII invalid, in denying the Government's motion to dismiss in several related cases. Neither of these decisions was made on written opinion. On the other hand, motions to dismiss filed on behalf of the collectors have been granted in a number of cases.

Not only in the Federal District Courts is there opinion that the refund procedure established by the Revenue Act of 1936 is invalid. Thus, in the case of *Marshall Field & Co., Inc.* v. *United States*, (U. S. Customs Court, Second Division, December 16, 1936), the United States Customs Court, in a written opinion, has held the whole of Title VII unconstitutional.

In view of the great amount of money involved and the number of persons affected, the economic desirability of a prompt determination of the questions raised, and the contrariety of opinion prevailing in the lower Federal Courts it is suggested that this Court should grant the pending petition for certiorari.

II.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE OF THE GREAT IMPORTANCE OF THE QUESTIONS OF LAW PRESENTED.

A. *Factual Situation.*

The basic facts common to all of the 200 cases now pending are as follows:

First, the collector of Internal Reenue under the duress of inevitable distraint, exacted and collected from the taxpayer various sums of money as so-called processing taxes. The exaction was under the provisions of the Agricultural Adjustment Act. These taxes were mere illegal impositions, as decided by this Court in *United States* v. *Butler*, 297 U. S. 1, and *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110.

Secondly, in each case the taxpayer filed with the Collector of Internal Revenue its claim for refund. The law as it stood when the claim was filed required the taxpayer to show to the Commissioner two facts, and no others, viz., (a) that the exaction was illegal; and (b) that the taxpayer paid the money. Accordingly the claim for refund filed by the taxpayer showed these two facts in the form then provided by the applicable Regulations.

Thirdly, the Commissioner of Internal Revenue formally rejected the taxpayer's claim upon the ground that the exaction was *not* illegal.

Fourthly, upon this rejection, the taxpayer had the right to sue, and did sue, the Collector, and on showing to the Court these two facts, and no others, was *then* entitled to a judgment *for the full amount exacted from him.*

(As the law then stood, no valid defense could have then been interposed by the collector.)

Fifthly, all of these things occurred before the enactment of the Revenue Act of 1936, which became effective July 22, 1936.

Title VII of that Act provides in substance:

(1) That no taxpayer can recover any amount of so-called processing taxes until (wholly disregarding the previous claim to the Commissioner, the Commissioner's rejection of that claim and the pending suit), the taxpayer files a *new* claim with the Commissioner *after* July 22, 1936, and before July 1, 1937; proving on such new claim to the satisfaction of the Commissioner (a) that the exaction was illegal; (b) that the claimant paid the money; and in addition (c) *that the taxpayer and no other person bore the economic burden occasioned by having paid the tax, and that the taxpayer did not in any manner by his operations in the processed article, reimburse himself for the money he paid out;*

(These additional facts are required to be proved, notwithstanding that the taxpayer never collected any amount from anyone *as a tax*, and made no contract or agreement with anyone concerning such a *tax*, but merely sold his product at a sales price, which the purchaser paid to get the goods.)

(2) that if and when the taxpayer establishes to the Commissioner's satisfaction the additional facts required, he will be entitled to a refund—not of *all* the money he paid the collector, but only of that portion of the money so paid, the ultimate *economic burden* of which was not *ultimately* borne by some one other than the taxpayer;

(3) that if the Commissioner decides against him, or makes no decision within two years, the taxpayer can appeal to a special board established by Title VII, where the same proof of additional facts is required;

(4) that after its adverse decision (which may require another period measured in years), taxpayer can appeal to the appropriate United States Circuit Court of Appeals, where proof of the same additional facts is required, and in proof of which facts, no new or independent evidence can be heard;

(5) that until this departmental procedure is completed, after the lapse of some years, no suit can be maintained to recover such processing tax, or any part thereof;

(6) that no interest is payable on any refund;

(7) that the liability of a collector to be sued for such processing tax is abolished.

B. *The Decision of the District Court in the Present Case.*

The opinion of the District Court for the Northern District of Alabama, Southern Division, consisted merely of the assertion that all of the questions in the suit were decided by the case of *United States* v. *Jefferson Electric Manufacturing Company*, 291 U. S. 386, 78 L. Ed. 859. The District Court indicated that it considered the burden of proving the new and additional facts required by Title VII of the Revenue Act of 1936, to be the same burden as that imposed by statute in the *Jefferson Electric* case.

In so holding the District Court failed to recognize the distinction between two very different situations. The statute considered in the *Jefferson Electric* case required the taxpayer to prove that he bore the burden of the tax, as a tax, and did not *by agreement with his vendee* collect the tax from the vendee, *as a separate identifiable sum*, treated by both vendor and vendee as a tax.

On this proof, the taxpayer was entitled to collect *all* of the money which he had paid to the collector and which he had not collected *as a tax* from his vendee.

By Title VII of the 1936 Revenue Act, the taxpayer is required to prove, *not* that he bore the burden of a tax, *as a tax*, but that he bore the economic burden which results from the imposition of any tax, without regard to whether or not he collected anything *as a tax* by agreement with his vendee, or merely sold his goods at a sales price which

may have been somewhat influenced by the additional cost of production resulting from the tax.

The basic distinction between these two burdens was recognized and clearly set forth by the Treasury Department in Regulations 47, issued in October, 1924, interpreting Section 600 of the Revenue Act of 1924, the statute involved in the Jefferson Electric Company case. This basic distinction was also pointed out by this Court in *Lash's Products Company* v. *United States*, 278 U. S. 175, 176.

However, these regulations and this controlling decision were completely overlooked by the District Court in the instant case.

The distinction between these two different types of statute is too important for this Court to ignore. The *Jefferson Electric* case held valid a statute which provided that only the taxpayer might recover a tax which had been improperly collected from him, and, that if he had assigned his right to the tax money by charging the tax to his vendee *as a separate item* under the permission of Regulations issued by the Commissioner of Internal Revenue, then not he, but his vendee-assignee—the actual taxpayer—might recover, unless he should give bond to pay the money over to his vendee-assignee. Title VII, on the other hand, prevents all refunds unless the taxpayer can show that he did not shift to his vendee the "economic burden" of the tax—a showing which the complexities of commerce and the limitations of cost accounting make impossible.

To permit the decision of the District Court in the instant case to stand unreversed is to sanction the extension of the Jefferson Electric doctrine to empower Congress to destroy all right to refunds, since, in an economic sense, all taxes are "shifted" or "passed on" by the taxpayer. It is respectfully suggested that such a result should not be reached, at least without the mature consideration of this Court.

C. *The Decision of the Circuit Court of Appeals in the Pending Case.*

Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the order of the District Court in the instant case granting the collector's motion to dismiss was affirmed, not because the Circuit Court was in agreement with the opinion of the District Judge that Title VII did not impose an unwarranted burden on the taxpayers, but because the Circuit Court believed that the District Court was without jurisdiction to decide the case at all.

The United States is not named as a party to the present suit. The complaint was brought against Harwell G. Davis, Collector of Internal Revenue. In spite of this, however, the opinion of the Circuit Court of Appeals consists of the assertion and argument of the following propositions:

(1) That an action against a Collector is in effect an action against the United States and that the Collector is merely a fictional defendant.

(2) That the United States may withdraw its consent to a suit against a Collector as an exercise of its sovereign immunity, thereby taking from the taxpayer all right of action to recover the taxes illegally exacted.

(1) No argument need be made at this point that the first proposition of the Circuit Court is incorrect. To say the least, it is startling. Certainly an action against a Collector and an action against the United States are legally distinct and separate, both in origin and effect, as has been successfully contended by Government counsel on behalf of a Collector of Internal Revenue in the case of *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1-4. *This has been consistently affirmed by this Court in a long line of decisions, and if the Circuit Court's opinion be correct, then this principle, expressed by this Court in the following cases, is overruled:*

Sage v. *United States*, 250 U. S. 33, 37.

Smietanka v. *Indiana Steel Co.*, 257 U. S. 1.
Union Trust Co. v. *Wardell*, 258 U. S. 357.
Levy v. *Wardell*, 258 U. S. 543.
Bankers Pocahontas Coal Co. v. *Burnet*, 287 U. S. 398.

(2) The second proposition of the Circuit Court of Appeals, *i. e.*, that the United States may withdraw its consent to a suit against a Collector as an exercise of its sovereign immunity thereby taking from the taxpayer all right of action to recover the taxes illegally exacted, is clearly inconsistent with the expressed opinion of this Court. This proposition assumes that sovereign immunity may be extended not only to protect the United States, but also to protect an officer who commits a wrong against an individual, although the result be to deprive the individual of all remedy for the wrong whatever.

At the time the plaintiff taxpayer in the instant case paid the taxes in question under the Agricultural Adjustment Act, there accrued to that plaintiff taxpayer the right to have the tax money refunded if the tax was invalid. As was said by this court in the case of *United States* v. *Jefferson Electric Company*, 291 U. S. 386, 401:

> "If the tax was erroneous and illegal, as is alleged, it must be conceded that • • • there accrued to the taxpayer, when he paid the tax, a right to have it refunded, without any showing as to whether he bore the burden of the tax, or shifted it to the purchasers."

At the time the plaintiff taxpayer paid the tax there also accrued to him a right of action against the Collector of Internal Revenue who wrongfully exacted the tax money.

By enacting Title VII Congress seeks to destroy not only the taxpayer's right against the United States but also the taxpayer's right against the individual Collector who committed the wrong.

The plaintiff in the instant case asserted this destruction of its vested rights as a ground for invalidating Title VII. However, the Circuit Court of Appeals dismissed this argument as not relevant, indicating that in its opinion sovereign immunity might be extended to an officer acting under an unconstitutional statute even when the result was the entire destruction of the taxpayer's vested rights.

This proposition is clearly contrary to the statement of this Court in the case of *Graham & Foster* v. *Goodcell*, 282 U. S. 409. Here this Court stated:

> "The argument of the government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States. • • • If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 679, 680."

This language, which appears to state clearly what has been the consistent opinion of this Court, cannot be reconciled with the Circuit Court's decision in the instant case.

D. *Conclusion.*

The foregoing discussion has not been intended as an argument that the decisions of the District Court and the Circuit Court of Appeals in the instant case are necessarily in error, but rather to call attention to one fact; namely, *that these decisions, which involve Constitutional questions of the greatest importance, are apparently inconsistent with decisions of this Court which have long been assumed to represent established law. To permit the decisions of the*

District Court and of the Circuit Court of Appeals to stand, unconsidered by this Court, can, therefore, result only in confusion in a field of law where certainty is of the greatest importance.

For this reason, as well as for the other reasons heretofore stated, it is respectfully suggested that this Court should grant the Petition for Certiorari in the pending case.

Respectfully submitted,

GEORGE T. BUCKINGHAM,

As Amicus Curiae.